

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GAIL O. HOLLY)	
Claimant)	
VS.)	
)	Docket No. 196,119 & 201,443
J. C. PENNEY COMPANY, INC.)	
Respondent)	
Self-Insured)	

ORDER

Respondent requested Appeals Board review of Administrative Law Judge Robert H. Foerschler's December 29, 1999, Award. The Appeals Board heard oral argument in Topeka, Kansas, on May 17, 2000.

APPEARANCES

Dale E. Bennett of Westwood, Kansas, appeared on behalf of the claimant. Kip A. Kubin of Overland Park, Kansas, appeared on behalf of the respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge consolidated both of these separate docketed claims for litigation purposes. The first claim, Docket Number 196,119, was filed by the claimant pro se on November 29, 1994, and alleged injuries to her upper extremities from a series of micro-traumas culminating on August 31, 1994. After claimant retained an attorney to represent her, another Application for Hearing was filed on May 3, 1995.

That Application for Hearing was assigned Docket Number 201,443 and alleged injuries to claimant's upper extremities due to repetitive work activities through January 5, 1995.

The Administrative Law Judge found claimant injured her upper extremities as a result of repetitive work activities while employed by the respondent with a single January 5, 1995, accident date. Neither party appealed that accident date finding and the Appeals Board, therefore, adopts the January 5, 1995, accident date for both of these docketed claims.

Based on a 60 percent task loss and a 40 percent wage loss, the Administrative Law Judge found claimant proved a 50 percent work disability. The Administrative Law Judge then found claimant had a four percent preexisting permanent functional impairment and reduced the 50 percent work disability by the preexisting four percent awarding claimant a 46 percent permanent partial general disability.¹

On appeal, the respondent contends the Administrative Law Judge erred in the calculation of claimant's pre-injury and post-injury average weekly wage. The respondent argues claimant's pre-injury average weekly wage is too high because the claimant failed to prove the amount of additional compensation that was discontinued by the respondent. Accordingly, the respondent contends the Administrative Law Judge erred in adding to claimant's straight-time weekly earnings a weekly amount found to be additional compensation. The respondent further argues the Administrative Law Judge erred in finding that claimant's regular and customary work week was 40 hours instead of 35 hours.

In regard to claimant's post-injury average weekly wage, the respondent contends the record proves that claimant was capable of earning post-injury \$7.00 per hour instead of the minimum wage hourly rate of \$5.15 per hour as found by the Administrative Law Judge. Additionally, because the claimant retains the ability to earn at least 90 percent or more of her pre-injury average weekly wage, the respondent argues claimant's disability is limited to her permanent functional impairment.²

If the Appeals Board finds claimant's wage loss is sufficient to entitle her to a work disability, the respondent contends claimant still is limited to an award based on her permanent functional impairment because she failed to prove a work task loss.

The claimant, on the other hand, requests the Appeals Board to affirm the Administrative Law Judge's 46 percent permanent partial general disability award.

¹See K.S.A. 44-501(c).

²See K.S.A. 44-510e(a).

The issues for Appeals Board review are as follows:

1. What is claimant's pre-injury average weekly wage?
2. What is claimant's post-injury average weekly wage?
3. What is the nature and extent of claimant's permanent disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the parties' briefs and arguments, the Appeals Board makes the following findings and conclusions:

The Administrative Law Judge has set out in his award a detailed and accurate recitation of the facts. The Appeals Board finds it is not necessary to repeat those findings of fact in this Order. Therefore, the Appeals Board adopts those findings of fact as its own. But, for the reasons more fully developed below, the Appeals Board concludes the Administrative Law Judge's Award should be modified from a 46 percent permanent partial general disability to a 54.5 percent permanent partial general disability.

1. What is claimant's pre-injury average weekly wage?

There is no disagreement that the record establishes claimant was earning \$8.65 per hour on January 5, 1995, the date of her accident. The first disagreement on the calculation of claimant's pre-injury average weekly wage relates to the number of regular and customary hours claimant was expected to work. The Administrative Law Judge found claimant was a full-time hourly employee with an ordinary work week of 40 hours. But the respondent argues claimant testified she was working 35 hours per week on the date of her accident. Therefore, the respondent contends that 35 hours was her regular and customary work week and should be utilized in calculating her pre-injury average weekly wage.

At the time claimant was employed by the respondent, she testified she was to work 40 hours per week. But because sometimes there was no work available, she did not always work 40 hours per week. The claimant admitted wage statements into evidence from the respondent for the 26-week period preceding August 31, 1994, and December 31, 1994. Both of these wage statements stated claimant was hired to work 35 to 40 hours per week. But the wage statements indicated claimant only worked 40 hours per week during three weeks of the total weeks represented on the wage statements.

The Appeals Board concludes claimant's regular and customary work week lies somewhere between 35 and 40 hours. Therefore, the Appeals Board finds that 37.5 hours per week more accurately represent the appropriate number of hours that should be utilized to compute claimant's pre-injury average weekly wage. Utilizing a 37.5 hour work week times \$8.65 per hour equals a straight-time hourly work week of \$324.38. Claimant testified that she did not work any overtime hours.

In addition to the straight-time hourly work week, the Administrative Law Judge added \$107.00 per week for additional compensation in the form of fringe benefits that the respondent discontinued when claimant left respondent's employment. But respondent argues it is claimant's burden to prove the amount of additional compensation to be added to the straight-time weekly money rate and claimant failed to do so.

Although K.A.R. 51-3-8(b) instructs the respondent, at the first hearing, to have payroll information available to answer any questions that might arise regarding the average weekly wage, the respondent did not produce any payroll information in regard to the employer's cost of fringe benefits. Therefore, the claimant, at the regular hearing, offered into evidence a Benefit Confirmation Statement that she had received from the respondent dated November 2, 1994. This statement described the fringe benefits respondent provided for its employees and the cost of those benefits indicating the employer's total cost and the employee's total cost.

At the time claimant offered this benefit statement for admission into the record, the respondent objected on the basis that the employer's cost included sick, vacation, and holiday pay which are not identified as additional compensation items, if discontinued, that are included in calculating the average weekly wage.³ But the Administrative Law Judge overruled respondent's objection and admitted the benefit statement into the record. The Administrative Law Judge found the employer's yearly cost as shown on the statement in the amount of \$5,284.00 or \$107.00⁴ per week should be added to claimant's straight time weekly money rate resulting in a pre-injury average weekly wage of \$453.00.

In a workers compensation case, the claimant has the burden to prove by a preponderance of the credible evidence his or her entitlement to an award of

³ See K.S.A. 44-511(a)(2) and Bohanan v. U.S.D. No. 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

⁴ If the employer's yearly fringe benefit cost of \$5,284.00 is divided by the 52 weeks contained in a year, the result is \$101.62 per week instead of the \$107.00 per week contained in the Award.

compensation and prove the various conditions on which that right depends.⁵ One of those conditions on which claimant's right to an award of compensation depends is claimant's pre-injury average weekly wage. The regulation, as set forth above, instructs the respondent to provide payroll information in order that the claimant's average weekly wage can be correctly computed. But if the respondent fails to provide such payroll information this does not excuse claimant from the statutory burden to prove this particular element of a workers compensation case.

The Appeals Board concludes the Benefit Confirmation Statement offered by the claimant contained the employer's costs of certain fringe benefits that are not included as additional compensation items as specified in the statute. Since these fringe benefit costs were unable to be factored out of the employer's cost, the claimant failed to prove the amount of additional compensation that was discontinued by the respondent. Accordingly, no weekly amount of discontinued additional compensation can be added to the straight-time weekly money rate. Therefore, the Appeals Board concludes claimant's pre-injury average weekly wage is \$324.38.

2. What is claimant's post-injury average weekly wage?

Claimant wrote respondent a resignation letter dated January 14, 1995, after she had worked her last day on January 5, 1995. The reason claimant stated in her resignation letter that she had to resign was because she could no longer perform the heavy repetitive work activities required in the drapery department because of the pain, swelling, and discomfort in her hands.

Respondent had provided claimant with medical treatment for her hands through Dr. Don Miskew on November 16, 1994. Dr. Miskew diagnosed claimant with degenerative osteoarthritis of the first metacarpal joint bilaterally. He recommended a change in claimant's work activities from repetitive work to non-repetitive work. As the result of those restrictions, respondent changed claimant to a greeting job from November 18, 1994, through December 24, 1994. But after Christmas, respondent returned claimant to the drapery department performing heavy, repetitive work activities.

After claimant's resignation in January 1995, she received unemployment benefits for approximately 5 months and made application for social security disability benefits. Claimant first received social security disability benefits in September of 1995 with retroactive payments to April 1995. Between September 1995 and August 1997 claimant attended Johnson County Community College and is within eight hours of receiving an associates degree in business entrepreneurship and marketing research. Claimant testified she did not look for a job between January 1995 and August 1997.

⁵ See K.S.A. 44-501(a) and K.S.A. 44-508(g).

Finally, in August 1997, claimant started working part-time for about 28 hours a week for John's Cigarette Outlet earning \$7.00 per hour. Her job duties were to wait on customers and stock shelves. She quit this job after about 6 weeks because the work aggravated her hands and she testified she simply could not stand the pain and discomfort. After claimant left John's Cigarette Outlet, she worked part-time as a telemarketer, a receptionist, and a bartender. She worked on the average approximately 20 hours per week earning between \$6.50 and \$7.00 per hour. Claimant testified she left all the part-time jobs because the job duties caused her pain and discomfort in her hands.

Although claimant claims she cannot work eight hours per day because of her hand problems, there is no evidence in the record that she is restricted by a physician from working 8 hours per day 5 days per week. Additionally, claimant was asked why she did not work more than 28 hours per week when she first started working part time for John's Cigarette Outlet. She replied she was limited in the number of hours she could work and still retain her social security disability benefits which included medical benefits.

The Administrative Law Judge found claimant had the ability to work 40 hours per week earning minimum wage of \$5.15 per hour or \$206.00 per week. But respondent argues claimant demonstrated she had the ability to earn \$7.00 per hour working part time and she is not restricted from working a 40 hour work week. The respondent contends claimant possesses the ability to earn \$7.00 per hour at 40 hours per week or \$280.00 per week.

The Appeals Board concludes the record as a whole proves claimant was primarily limiting herself to part-time work because she could not work full time and remain eligible for social security disability benefits. Claimant demonstrated she was capable of finding employment earning between \$6.50 and \$7.00 per hour. Therefore, the Appeals Board concludes claimant's appropriate post-injury average weekly wage should be computed based on 40 hours per week earning \$6.75 per hour or \$270.00 per week.

3. What is the nature and extent of claimant's disability?

For an injured worker to be entitled to a work disability, the worker has to make a good faith effort to find appropriate employment or a wage will be imputed to the worker based on what the worker would be able to earn.⁶ In this case, the Appeals Board finds claimant did not make a good faith effort to find appropriate employment. Because claimant applied for and received social security disability benefits, she did not

⁶Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

seek full-time employment, she attended college, and finally she essentially took herself out of the open labor market because she was babysitting with her grandchild. Therefore, the post-injury average weekly wage of \$270.00 as found above should be imputed to the claimant for the purpose of determining claimant's entitlement to a work disability. As required by statute, claimant's pre-injury average weekly wage of \$324.38 should be compared with her post-injury average weekly wage of \$270.00, which computes to a wage loss of 17 percent.⁷

Claimant is entitled to a work disability if it exceeds her permanent functional impairment rating and claimant is not capable of earning a wage equal to 90 percent or more of her pre-injury average weekly wage. Work disability is the average of wage loss and work task loss. The work task loss is the loss of the injured worker's ability to perform the work tasks the worker performed during the 15-year period next preceding the work-related accident.⁸

Zita J. Surprenant, M.D., examined and evaluated claimant at her attorney's request on March 16, 1998. Dr. Surprenant was the only physician to give a work task loss opinion. After reviewing claimant's medical treatment records, taking a history from claimant, and performing a physical examination, Dr. Surprenant diagnosed claimant with osteoarthritis primarily involving the first metacarpal phalangeal thumb joints, greater on the left than the right. She opined that claimant had sustained permanent aggravation of her preexisting metacarpal joint arthritis due to the work activities she performed while employed by the respondent.

The doctor permanently restricted claimant to avoid repetitive activities of her upper extremities. Also claimant should avoid sustained pinching and repetitive pinching and grasping. Further, claimant should limit lifting to 10 pounds on an occasional basis.

Dr. Surprenant had claimant list the jobs she had worked in the 15 years next preceding her work-related accident. Also, the doctor had claimant describe the various work tasks she had to complete in order to do those various jobs. Dr. Surprenant then took claimant's list and compiled a Task Ability Report. Working from that Task Ability Report, Dr. Surprenant determined, based on the permanent work restrictions she had placed on claimant, whether or not claimant could perform each individual work task. The doctor concluded that claimant could not perform any of her previous work tasks except for the work tasks she performed as a greeter while she was employed by the respondent from November 18, 1994, through December 24, 1994. Dr. Surprenant,

⁷See K.S.A. 44-510e(a).

⁸See also K.S.A. 44-510e(a).

therefore, concluded, because the greeter job only comprised a little over a month of the full 15-year job period, that claimant had a 100 percent work task loss. Also, another reason the greeter job should not be included in the 15-year period is because this was an accommodated job as the result of her work-related injuries.

The Administrative Law Judge found claimant had a 60 percent task loss instead of Dr. Surprenant's 100 percent task loss. Although the Administrative Law Judge found Dr. Surprenant did an excellent job of analyzing the work task data claimant supplied her, he nevertheless thought Dr. Surprenant accepted claimant's description of the work tasks to the degree that it raised doubt as to the doctor's impartiality. The Administrative Law Judge then seemingly arbitrarily reduced claimant's work task to 60 percent.

But the respondent argues Dr. Surprenant's work task opinion is not reliable and should be disregarded all together. Respondent claims Dr. Surprenant's work task opinion is unreliable because she was unsure of a definition of a work task, she has no vocational training, she did not observe any of the jobs that were described, and she did not have any conversation with claimant's former employers in reference to the jobs performed and the work tasks it took to complete those jobs.

The Appeals Board, however, concludes Dr. Surprenant's opinion that claimant has a 100 percent work task loss is reliable, reasonable, and not improbable. In order to compile an accurate list of both claimant's previous jobs and the work tasks it took to complete those jobs, Dr. Surprenant interviewed claimant and then had claimant prepare a comprehensive job and work task list. From the personal interview and the list prepared by claimant, plus additional telephone conversations with claimant in regard to specific dates, Dr. Surprenant prepared the Task Ability Report. She then applied the permanent work restrictions she had imposed on claimant because of her work-related injury to the list of work tasks.

The respondent chose not to present contradictory evidence to Dr. Surprenant's opinion on claimant's work task loss. Uncontradicted evidence which is not improbable or unreasonable can not be disregarded unless it is shown to be untrustworthy.⁹ The Appeals Board does not find that Dr. Surprenant's opinion on the issue of claimant's work task loss is untrustworthy or is otherwise unreliable. Therefore, the Appeals Board adopts Dr. Surprenant's 100 percent work task loss.

As required by K.S.A. 44-510e(a), claimant's work task loss of 100 percent is averaged with her 17 percent wage loss resulting in a 58.5 percent work disability.

⁹ See Demars v. Rickel Manufacturing Corporation, 223 Kan. 374, 573 P.2d 1036 (1978).

Dr. Surprenant also gave an opinion on claimant's permanent functional impairment based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised). She assigned a 6 percent permanent functional impairment to claimant's right hand which she converted to a 3 percent whole body rating. She assigned a 9 percent permanent functional impairment to the left hand which she converted to a 5 percent whole body rating. Those two whole body ratings were combined for an overall 8 percent permanent partial functional impairment of the body as a whole. Finally, she attributed 4 percent of the 8 percent functional impairment rating to claimant's preexisting degenerative arthritic condition.

The respondent had employed David J. Clymer, M.D., an orthopedic surgeon, to examine and evaluate claimant in 1997. Dr. Clymer saw claimant on April 9, 1997. He testified by deposition on November 1, 1999, in reference to this examination.

Also based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Clymer assessed claimant with a 3 percent permanent functional impairment of the right hand or 2 percent permanent functional impairment of the whole body. The left hand was assessed with a 9 percent permanent functional impairment or a 5 percent permanent functional impairment of the body as a whole. He then combined those whole body ratings for a 7 percent whole body permanent functional impairment. Dr. Clymer also opined that of the 7 percent rating, 4 percent was preexisting progressive degenerative arthritis.

The Appeals Board finds there is no reason to give one of the physician's opinion more weight than the other. Therefore, the Appeals Board concludes that claimant's permanent functional impairment is 7.5 percent of the body as a whole with 4 percent preexisting for a 3.5 percent permanent functional impairment relating to her work injury while employed by the respondent.

As mandated by K.S.A. 44-501(c), claimant's 58.5 percent work disability shall be reduced by the four percent permanent functional impairment determined to be preexisting entitling claimant to a 54.5 percent permanent partial general disability award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Robert H. Foerschler's December 29, 1999, Award should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gail O.

Holly, and against the respondent, J. C. Penney, a qualified self-insured, for an accidental injury which occurred January 5, 1995, and based upon an average weekly wage of \$324.38.

Claimant is entitled to 226.18 weeks of permanent partial disability compensation at the rate of \$216.26 per week, making a total award of \$48,913.69 for a 54.5 percent permanent partial general disability.

As of May 30, 2000, the entire award of \$48,913.69 is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

All other orders entered by Administrative Law Judge in the Award are approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of May 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale E. Bennett, Westwood, KS
Kip A. Kubin, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director